Filed 6/11/07 P. v. Guillmeno CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONNA ANNE GUILLMENO, Defendant and Appellant.	E041477 (Super.Ct.No. RIF123422) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert George Spitzer, Judge. Affirmed.

Carmela F. Simoncini, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela R. Ratner Sobeck, Supervising Deputy Attorney General, and David Delgado-Rucci, Deputy Attorney General, for Plaintiff and Respondent.

Pursuant to an "open plea to the court," defendant pleaded guilty to four counts of sale of cocaine base (Health & Saf. Code, § 11352, subd. (a)). In addition, she admitted that she had four enhancements that made her presumptively ineligible for probation (Pen. Code, § 1203.073, subd. (b)(7))[1] and that she had suffered a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). The plea agreement was conditional on the fact that probation would be denied and that defendant would be ordered to undergo a 90-day diagnostic study pursuant to section 1202.03. Following a sentencing hearing, defendant was sentenced to a total term of eight years in state prison: four years doubled to eight years on count 1; sentences on counts 2 through 4 were imposed concurrently. Additionally, the entire case was ordered to run concurrent with the sentence imposed in case No. RIF 102028, for which defendant's probation was revoked as a result of the current case. Defendant's sole contention on appeal is that the sentencing court abused its discretion by predetermining it would not consider probation or other commitment, thereby foreclosing any invitation to exercise its discretion pursuant to section 1385. We reject this contention and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

On March 22, 2005, undercover Riverside Police Officer Mario Dorado was assigned to attempt to buy drugs at a residence on Seventh Street in the City of Riverside.

---

[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the preliminary hearing transcript.

On that date, he made two separate purchases of rock cocaine from defendant at that residence an hour apart. On March 23, 2005, undercover Riverside County Deputy Sheriff Juan Anguiano went to defendant's residence and purchased $20 worth of rock cocaine from defendant. On April 6, 2005, Officer Dorado returned to defendant's residence on his bicycle and made another purchase of cocaine.

On September 13, 2005, an information was filed against defendant alleging four counts of sale of cocaine base. The information also alleged that defendant was presumptively ineligible for probation as to all four counts pursuant to section 1203.073, subdivision (b)(7) and that defendant had suffered a prior strike conviction.

On February 24, 2006, criminal proceedings were suspended when the court declared a doubt as to defendant's competency. Three separate doctors were appointed to evaluate defendant.

On May 12, 2006, after the parties stipulated that defendant's competency would be decided on the basis of the psychological reports, the trial court found that defendant suffered from a mental disease or defect but that she was able to understand the proceedings and cooperate with counsel. Criminal proceedings were thereafter reinstated.

On that same day, following a chambers conference, defendant entered into an "open plea to the court" wherein she pleaded guilty to all of the charges and enhancements. At that time, the court informed defendant that it would not give an indicated sentence but order defendant to undergo a 90-day diagnostic study pursuant to section 1203.03. The court also informed defendant that she was ineligible for a

commitment to the California Rehabilitation Center (CRC) or for probation because of her prior strike conviction. In addition, as a condition of her plea, defendant acknowledged in her change-of-plea form that probation would be denied.

Subsequently, defendant, after acknowledging that she understood her constitutional rights and was waiving those rights, pleaded guilty to four counts of sale of cocaine base and admitted that she had four enhancements that made her presumptively ineligible for probation and that she had suffered a prior strike conviction. The court found the plea to be free and voluntary and that defendant had knowingly and intelligently waived her constitutional rights.

On August 18, 2006, defendant was sentenced to a total term of eight years in state prison. Defendant subsequently filed a timely notice of appeal and request for certificate of probable cause. The court denied the certificate of probable cause.

II

DISCUSSION

Defendant claims that she was foreclosed from making a motion to dismiss her prior strike and be deemed outside the sprite of the three strikes law when the court indicated it would not consider sending defendant to CRC or placing her on probation.

The People respond the appeal should be dismissed because her contention is an attack on the plea for which a certificate of probable cause is required.

Defendants who enter guilty pleas may not appeal their convictions unless the trial court executes and files a certificate of probable cause. (§ 1237.5.) There is an exception to this requirement for "issues regarding proceedings held subsequent to the plea for

purpose of determining the . . . penalty to be imposed." (*People v. Buttram* (2003) 30 Cal.4th 773, 780 (*Buttram*); see California Rules of Court, rule 8.304(b)(4)(B) [certificate of probable cause not required for "[g]rounds that arose after entry of the plea and do not affect the plea's validity"].) To determine whether section 1237.5 applies to the imposition of a sentence, "the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." (*Buttram*, at p. 782.) An appeal of a sentence challenges the validity of the plea "if the sentence was part of a plea bargain. [Citation.] It does not if it was not . . . ." (*People v. Lloyd* (1998) 17 Cal.4th 658, 665.)

In *People v. Panizzon* (1996) 13 Cal.4th 68 (*Panizzon*), the Supreme Court held that where a defendant is sentenced in accordance with the terms of a plea bargain that provides for a *specified* sentence and then attempts to challenge that sentence on appeal, he or she must secure a certificate of probable cause. The court explained that since the defendant is "in fact challenging the very sentence to which he agreed as part of the plea," the challenge "attacks an integral part of the plea [and] is, in substance, a challenge to the validity of the plea, which requires compliance with the probable cause certificate requirements of section 1237.5 and [former Cal. Rules of Court,]rule 31(d)." (*Id*. at p. 73.)

Here, defendant did not agree to a specified prison term as part of her plea bargain. The Supreme Court addressed this distinction in *Buttram*, in which the defendant pleaded guilty to felony drug charges in return for an agreed maximum sentence. The defendant then appealed the trial court's denial of diversion and imposition of the maximum term.

(*Buttram*, *supra*, 30 Cal.4th at p. 776.) The Court of Appeal majority, relying on *People v. Hester* (2000) 22 Cal.4th 290 and *Panizzon*, *supra*, 13 Cal.4th 68, concluded that the defendant, by appealing the sentence he agreed could be imposed, effectively attacked the validity of the plea. Accordingly, the appellate court determined that, in order to challenge an imposed sentence that fell within the negotiated maximum term, a probable cause certificate was required. (*Buttram*, at pp. 776-777.)

Our Supreme Court reversed, stating: "Unless it specifies otherwise, a plea agreement providing for a maximum sentence inherently reserves the parties' right to a sentencing proceeding in which (1) as occurred here, they may litigate the appropriate individualized sentence choice within the constraints of the bargain and the court's lawful discretion, and (2) appellate challenges otherwise available against the court's exercise of that discretion are retained. An appellate challenge to the exercise of the discretion reserved under the bargain is therefore a postplea sentencing matter extraneous to the plea agreement. Such a claim may rarely have merit, but it does not attack the validity of the plea. For that reason, a probable cause certificate is not required." (*Buttram*, *supra*, 30 Cal.4th at p. 777.)

The Supreme Court further observed: "The parties to a plea agreement are free to make any lawful bargain they choose, and the exact bargain they make affects whether a subsequent appeal, in substance, is an attack on the validity of the plea. When the parties negotiate a *maximum* sentence, they obviously mean something different than if they had bargained for a *specific* or *recommended* sentence. By agreeing only to a maximum sentence, the parties leave unresolved between themselves the appropriate sentence

within the maximum. That issue is left to the normal sentencing discretion of the trial court, to be exercised in a separate proceeding." (*Buttram, supra,* 30 Cal.4th at p. 785.)

In the present matter, the parties did not agree to a specific sentence. Instead, the parties apparently agreed that defendant would admit guilt to the all four counts of sale of cocaine base and admit all of the enhancement allegations for an unspecified sentence. Although the guilty plea contemplated a denial of probation, the sentence term was not indicated. As the court's comments made clear, the court was unsure of the penalty to impose and ordered a 90-day diagnostic evaluation of defendant to assist it in sentencing defendant. "'[W]hen the question of whether to impose the negotiated maximum is left to the court's discretion at an adversary hearing, an appeal challenging the court's exercise of that discretion is not, in substance, an attack on the validity of the plea.'" (*Buttram, supra,* 30 Cal.4th at p. 787.)

The issue raised in defendant's appeal fall squarely within the exception to section 1237.5, since the plea agreement reserved to the parties the right to argue the sentencing choices available to the court. The court noted, "[I]t's an open plea to the Court. There's no plea bargain on the part of the People, no restriction on the part of your attorney, or you to argue what I should give, but you need to know that I'm not going to grant you probation and you can't go to CRC." Accordingly, as in *Buttram,* we find that defendant here did not waive her right to appeal as to sentencing.

However, to the extent defendant attacks the validity of the plea, we agree with the People for the reasons noted above. Defendant claims that the court abused its discretion by foreclosing her from making a motion to strike when it informed her that it would not

consider probation or CRC because of her prior strike conviction. We note that defendant waived her right to receive a grant of probation as part of her plea agreement. The plea form notes that probation would be denied. Defendant signed this agreement, and indicated that she read and understood the agreement. Her attorney also signed the agreement indicating he had explained the agreement to defendant, as well as her constitutional rights and the consequences of pleading guilty. Additionally, the court clearly informed defendant that it was not going to grant probation or CRC. When the court asked defendant if she understood that, she replied in the affirmative. If defendant believed she would be granted probation, she should not have entered into the plea agreement.

To the extent defendant claims that she was foreclosed from making a motion to strike so that she could have been sentenced outside the spirit of the three strikes law, we disagree. There is nothing in the record to suggest that the trial court foreclosed defendant from making a motion to strike pursuant to section 1385. In fact, the court clearly informed defendant and her counsel that there were "no restriction[s]" on defendant and her counsel's part to argue to the court what sentence it should give defendant.

"A defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385. But he or she does have the right to 'invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his [or her] assertion that the dismissal would be in furtherance of justice.'

[Citation.] And '[w]hen the balance falls clearly in favor of the defendant, a trial court not only may *but should* exercise the powers granted to him by the Legislature and grant a dismissal in the interests of justice.' [Citation.] Nonetheless, any failure on the part of a defendant to invite the court to dismiss under section 1385 following *Romero* waives or forfeits his or her right to raise the issue on appeal. [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376, citing *People v. Scott* (1994) 9 Cal.4th 331, 352-353.) Here, we do not find, and the record does not show, that when the court informed defendant and her counsel that it would not consider probation or a commitment to CRC it foreclosed defendant from making a section 1385 motion or that making a section 1385 motion would have been a futile act. Accordingly, we find defendant waived this issue on appeal.

Even if counsel had made a motion to strike, there is no evidence in the record to suggest that the court would have struck defendant's prior strike. The court quite clearly explained to defendant that it would not grant probation or a commitment to CRC due to her prior strike. When ruling whether to vacate a prior serious felony conviction finding under the three strikes law pursuant to section 1385, subdivision (a), "the court in question must consider whether, in light of the nature and circumstances of [defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his [or her] background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he [or she] had not previously been convicted" of one or more serious felonies. (*People v. Williams*

(1998) 17 Cal.4th 148, 161; see also *People v. Barrera* (1999) 70 Cal.App.4th 541, 553-554.)

Dismissal of a strike under section 1385 is a departure from the sentencing norm. (See *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434; see also § 1385.) Accordingly, "the trial court may ordinarily rely on the record of conviction to justify the denial of relief under . . . section 1385." (*Gillispie*, at p. 434.) To justify reversal on appeal, generally an "error must affirmatively appear on the record." (*Ibid.*; accord, *People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The trial court's ultimate conclusion is evaluated "under the deferential abuse of discretion standard." (*Myers*, at p. 309.)

" . . . 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

Applying these standards, we find ample support for the trial court's sentencing choice. Defendant has exhibited a pattern of serious criminal activity spanning her entire adult life and is the type of individual for whom the three strikes law was enacted. We are unpersuaded by defendant's assertion that due to her extensive history with mental illness she should be treated outside the three strikes sentencing scheme. Defendant's prior record, her probation violations, the seriousness of the present and past offenses, her seemingly dim prospects for rehabilitation, and the lack of meaningful crime-free periods

demonstrate she has not learned from her extensive experience with the judicial or correctional system. Defendant exemplifies "the 'revolving door' career criminal to whom the Three Strikes law is addressed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) Striking a prior serious felony conviction "'is an extraordinary exercise of discretion, and is very much like setting aside a judgment of conviction after trial.' [Citation.]" (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.) Accordingly, such action is reserved for "[e]xtraordinary" circumstances. (*People v. Strong* (2001) 87 Cal.App.4th 328, 332.) This case, however, is far from extraordinary.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.